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ALPHABETICAL TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM HENRY PACKARD,
Appellant,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

BRIEF OF THE ALLIED TAXI OWNERS ASSOCIATION *(Amicus Curiae)*.

This brief is filed in behalf of the Allied Taxi Owners Association, an organization representing the owners of in excess of 4,000 motor vehicles of the type within the provisions of the act.

POINT I.

The equal protection of the law to those within the jurisdiction of the State of New York is denied by the statute in question.

The Legislature in the enactment of any measure under the guise of an exercise of the police power, cannot disregard the constitutional provision enjoining the equal protection of the laws to all persons within its jurisdiction. In exercising such power by the passage of an act such as that now in review, having for its ostensible purpose the safety of pedestrians upon the public highways, the Legislature is bound to impose its burdens equally upon all those individuals constituting the class from which the danger sought to be remedied can reasonably be apprehended. It cannot arbitrarily, by legislative fiat or otherwise, impose such burdens merely upon certain individuals composing such class, leaving others, from whom the danger sought to be guarded against may equally be apprehended, untrammelled in the performance of those acts which the Legislature deems to be a source of danger.

It cannot certainly be denied in the circumstances now before the Court, that those individuals, exempted from the operation of this onerous penal statute, are not equally responsible for the existence of the hazard in question. Indeed, it may fairly be argued by a reference to the schedule of casualties included in the record herein, that the very individuals who are exclusively subjected to the burdens of the act in question, have occasioned

a much smaller proportion of casualties than those individuals who are exempt.

The learned Attorney General in the Court below contended at some length, and submitted authority, that the control of the highways by provisions respecting the operation of motor vehicles was a power which the Legislature enjoyed. The appellant does not question the right or authority on the part of the State Legislature to legislate upon this subject. This Court has too frequently enunciated the principles involved to warrant any denial or qualification. Nevertheless, the exercise of such power by the Legislature must itself be observed with relation to certain principles of equality—principles which either are inherently involved in the exercise of the power itself, or involved in the circumscribing provisions of the Constitution.

The respondent in the Court below quoted at some length from the opinion of Chief Judge CULLEN, in *People* v. *Rosenheimer,* 209 N. Y. 115; 35 Ann. Cases 160; 46 L. R. A. (N. S.) 977, upholding the exercise of the power by the Legislature to enact a measure requiring operators of motor vehicles to report to the authorities all casualties occurring in the operation of their vehicles. While it might be argued as a matter of principle, that, as stated by the Court, "The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the State," it surely cannot be contended, paraphrasing the language of the Court, that the Legislature might by any arbitrary classification, prohibit the use of certain motor vehicles upon the public highways, permitting others in like case to operate unrestrained. If that act had provided that only motor vehicles operated

upon the public highways for hire in the transportation of passengers shall be required to report to the police officials any casualty in which they might have been involved, and eliminated from this penal provision the large number of motor vehicles of other classes, there is no doubt but that the learned Court of Appeals would have declared the act grossly discriminatory, and as denying to those within its jurisdiction the equal protection of the laws. An examination of the various statutes enacted by the Legislature of the State of New York, regulating the conduct of certain enterprises, i. e., pawnbrokers, auctioneers, insurance agents, liquor vendors, and others, to which the learned Attorney General referred in the Court below, will indicate that these statutes are general in their operation in so far as they were intended to and actually covered all of the individuals engaged in those occupations. Those statutes requiring individuals engaged in certain enterprises vested with a public interest, to furnish a bond or other security, before engaging in the pursuit of their vocations, are also general in their operation, and actually relate to all of the individuals or corporations engaged in such enterprise.

There is nothing in the record herein indicating that the hazard sought to be guarded against by the exercise of the power in question is one specifically attributable to motor vehicles in first-class cities, engaged in the carrying or transportation of passengers for hire, nor can such special application be in any way justified by an examination of the statute itself. We are here concerned with the interpretation and effect of a statute penal in its nature and one to be strictly construed. Were

this appellant to become involved in a common disaster upon the public highways of the City of New York with a vehicle of the class not included within the statute, resulting in damage to person or property, the appellant, under pain of fine or imprisonment, would be required to secure to the injured person his damages through the medium of the bond required, whereas the operator or owner of the motor vehicle equally involved in the occurrence of the casualty, would escape such burdens, and even though his liability may have been equal to that of the appellant, would in no sense be guilty of any crime were the injured one unable to collect any judgment against him.

In short, we maintain that the Legislature, in controlling the highways, should not be permitted to distinguish between persons of the same class when the purposes for which it exercises its power are equally applicable to all. The conduct of the business of operating vehicles for hire is a legitimate occupation, and the danger of casualty to pedestrians on the public highways is not an incident, to the operation of such business alone, but is rather an incident to the operation of all vehicles on the public highways, whether or not engaged in the business in question.

It cannot be urged, as intimated by the respondent, in the Court below, that the act is merely a regulation by the State of a business vested with a public interest. The purpose of the act does not affect the conduct of the plaintiff's business as such, but rather affects the users of the public highways in general without regard to the business upon which they may be engaged. The principle upon which the Legislature may discriminate in the pas-

sage of acts similar to those now before this Court, is set forth in numerous decisions.

In the case of *Soon Hing* v. *Crowley,* 113 U. S., at pp. 708 and 709, the Court said:

> "The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions."

In that case the business in question was deemed to be attended by a peculiar hazard to which other businesses were not incident.

In the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S., at p. 293, the Court said:

> "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.'"

Again, Mr. Justice BREWER, in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 165, after a careful consideration of many cases, said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

As was said in the case of *Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684, the police power must be exercised in subordination to the provisions of the Federal Constitution. If in the assumed exercise of its police power, the Legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void. In the last cited case, the defendant in error contended that the act regulating railroads then under review was a mere regulation of the public business, but the Court held that the regulation provided by the Legislature could not be so effected as to convenience a portion of the persons who might use the railroad, while refusing such convenience to others under some other circumstances.

We quote from the opinion in *Louisville & Nashville R. R. Co.* v. *Bosworth,* 230 Fed., at p. 207, modified 37 Supr. Ct. 683:

> "And what is it, then, to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an inten-

tion, in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there is an intention to treat differently or to discriminate. One is always held to intend that which is the natural consequence of what he does. The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the state in the exercise of its particular function, and its effect is to empower and to make it incumbent on the Courts, State and Federal, to prevent discrimination and to secure equal treatment."

POINT II.

The Legislature, in exacting from those affected by the statute security for the payment of judgments, has denied to them equal protection of the laws.

We respectfully enlist the consideration of the Court to another phase of this problem, and one which lends itself to supporting the contention of the appellant. The act under review contains no provisions for the regulation of the motor vehicles in question in the sense of imposing requirements for their safe operation, but is solely directed to insuring to plaintiffs in suits against the individuals operating such motor vehicles the collection of any judgment which they may obtain by imposing upon the defendants in such actions the obligation to furnish sufficient sureties. It is in short a penalty imposed upon defendants in cer-

tain classes of litigation to insure the payment of their debts.

This proposition was decided in the case of *Gulf, C. & S. F. R. R. Co.* v. *Ellis,* 165 U. S. 150; 41 L. ed. 666; 17 Supr. Ct. Reporter 255. In that case, the Legislature of the State of Texas had enacted a law providing that if certain claims presented to the railroad company for adjustment and not exceeding $50 were not compromised, and the claimant recover upon such claim, attorneys' fees not in excess of $10 be added to the judgment The railroad company, upon appeal to this Court, raised the point that the statute, with respect to the assessment of attorneys' fees, operated to deprive it of property without due process of law, and denied to it the equal protection of the laws. The exaction in such cases was made only against the railroad companies and in certain cases, including, among others, claims for damage to property.

Mr. Justice BREWER, in writing the opinion of the Court, said:

> "It is simply a statute imposing a penalty upon a railroad corporation for failure to pay certain debts. No individuals are thus punished, and no other corporation. The act singles out a certain class of debtors, and punishes them, when for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the Courts as other litigants in like conditions and with like protection."

The Court gave consideration to numerous decisions of the State Courts, holding similar acts unconstitutional.

We quote further from the opinion of Mr. Justice BREWER:

> "It is of course proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before such a distinction can be made between debtors, and one be punished for failure to pay debts while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more important in one instance than in the other.
>
> If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not meet with the privilege. Only the railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. * * *
>
> But if the classification is not based upon the idea of a special privilege, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police power, may justly require many things to be done by them in order to secure life and property. * * *
>
> But a mere statute to compel the payment of an indebtedness does not come within the

> scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in some cases there may be peculiar obligations which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

Certain principles relative to the applicability of the Fourteenth Amendment and applied by Mr. Justice BREWER in the *Ellis* case are equally applicable in the case at bar. The Texas statute imposed the burden upon one litigant, the defendant railroad company, in a certain class of actions. The Legislature of the State of New York, in the statute now under consideration, has placed the burden upon one class of litigants in certain actions. Although the burden in the Texas case is the payment of an additional sum by way of penalty, while the burden imposed by the Legislature of the State of New York is in form a penal provision requiring the filing of the bond in question, the principles involved are the same. In both cases burdens are imposed upon defendants which are not only not imposed upon the plaintiffs in the litigations to which the statutes are confined, but similar burdens are not placed upon all defendants under the same circumstances. In the Texas case the statute imposed a penalty upon the defendant for failure to pay certain debts. In the instant case the statute imposes a penal provision by way of fine or imprisonment for failure to afford surety by way of bond to certain plaintiffs in certain causes of action conditioned upon the payment of certain debts. We will here utilize

the language of Mr Justice BREWER to indicate the applicability of the principles set forth in the *Ellis* case to the case at bar.

No owners or operators of other motor vehicles (i. e., vehicles not engaged in the carrying of passengers for hire) are required to perform the onerous conditions of the act. Others, although in similar circumstances, and although sued for precisely the same cause of action, to wit, damage to person or property, are not required to give bond. The act singles out a certain class of debtors, to wit, owners and operators of those motor vehicles which are engaged in the transportation of passengers for hire and against whom judgment may be obtained for personal or property damage and punishes them for failure to insure to the respective plaintiffs the payment of such judgments, when for like delinquencies it punishes no others. All defendants, owners or operators of all motor vehicles operating for any purpose upon the streets of the State are not treated alike nor equally. The defendants included within the contemplation of the act cannot appeal to the Courts as other litigants under like conditions and for like protection. The statute requires a bond to be furnished to insure the payment of any judgment which may be procured arising out of damage to the plaintiff's person or property. It is apparent that such circumstances would arise in the event of a collision between two motor vehicles. Litigation results in which the owner or operator of a motor vehicle not included within the provisions of the act demands judgment against the defendant operator of a motor vehicle for the transportation of passengers for hire. The latter interposes a coun-

terclaim demanding an affirmative judgment against the plaintiff for precisely the same damage sought to be recovered by the plaintiff arising out of the same circumstances and the result of the same hazard. If such litigation terminate adversely to the defendant, the plaintiff is assured of the payment of his judgment by the provisions of the act, an assurance which the defendant has been compelled to give at some expense and under penalty of punishment for misdemeanor. If the litigation terminates in favor of the defendant awarding to him damages upon his counterclaim upon precisely the same cause of action as alleged by the plaintiff, he has no such assurance for the collection of his judgment. It is not sufficient answer to this contention to say that owners and operators of motor vehicles for the transportation of passengers for hire only bear the burdens of the act when adjudged to be in the wrong, to wit, if the finding of fact is made that they have operated their vehicles negligently. The conclusion is inevitable that they both do not enter the Courts upon equal terms. Those operating motor vehicles for the transportation of passengers for hire must assure to their opponents the collection of the latter's judgments. They have no such assurance of the collection of judgments they may obtain against the others under similar circumstances. It follows, therefore, that in suits to which they are parties defendant, they are discriminated against and are not treated as other defendants under similar circumstances and in similar actions. They do not stand equally before the law. They do not receive its equal protection.

As was said by Mr. Justice BREWER, "It is of course proper that every debtor should pay his

debts," and further following the language of the Court, there might be no impropriety in giving to every successful suitor in actions for personal or property damage against all owners and operators of motor vehicles assurance of the collections of their judgment by the requirement upon all defendants in such cases to file bonds. Before a distinction can be made between debtors constituting the same class, i. e., owners and operators of all motor vehicles, and some of them punished for failure to furnish a surety for the payment of such debts, while others are permitted in like manner to shake the burdens of the act, there must be some difference in the obligation to pay, some reason why the duty to pay is more important in one instance than in another. It cannot be justly said that the obligation by the owner and operator of a motor vehicle for the transportation of passengers for hire to pay the debt, evidenced by judgment against him, is a more important obligation than that of the owner or operator of another motor vehicle also evidenced by a judgment for the same causes. No reasonable exercise of one's imaginative faculties can create any distinction between such debts. It cannot be said that the penalty imposed in the act in question is cast only upon a certain class to whom special privileges are granted and therefore upon them special burdens may be imposed. The special burdens are not imposed upon all to whom such special privileges are granted. The special privilege in question is the use of the public highways for the operation of motor vehicles. The special privilege is not that of operating a business of transporting passengers for hire. The obligation imposed by

the act has absolutely no relation whatsoever to the mere conduct of the business. In short "The burden does not meet with the privilege."

The statute to compel the payment of a judgment in this case does not come solely within the scope of police regulations. The business of operating motor vehicles for the transportation of passengers, which may be construed as a hazardous one, carries with it no special necessity for insuring to judgment creditors the payment of their debts. That is an obligation resting upon all judgment debtors against whom judgments may be obtained for damage to personal property arising out of the negligent operation of any class of motor vehicles upon the public highways. Yet such a debt does not spring from the mere conduct of the business of transporting passengers in motor vehicles for hire.

The opinion of Mr. Justice BREWER in the *Ellis* case has been interpreted in other circumstances, and in cases where different conclusions based upon different facts were found. Such subsequent decisions are collated in the opinion of Mr. Chief Justice TAFT in the case of *Chicago & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.*, decided November 13, 1922, 67 L. ed. 46. Reference was made to *A. T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; 43 L. ed. 909; 19 Supr. Ct. Reporter 609, where a statute imposed the payment of the reasonable attorneys' fees upon a defendant railroad company when unsuccessful in an action for damages for fire caused by the negligent operation of the railroad. The Court in upholding the validity of the statute indicated that the act in question was not for the purpose of enforcing the payment of a

debt, but to secure the utmost care on the part of the railroad in the operation of its trains, to prevent the escape of fire from moving locomotives. It was shown that the decision in the *Ellis* case followed the decision of the State Courts with respect to the interpretation of the statute then under review and its purpose. Incidentally, the Court said, page 100:

> "This Court is not concluded by the opinion of the Supreme Court of the State. It forms its own independent judgment as to the scope and purposes of the statute, while, of course, leaning to the interpretation which has been placed upon it by the highest Court of the State" (four Justices dissenting, basing their dissent upon the decision in the *Ellis* case).

In *Seaboard Air Line Ry. Co.* v. *Seegers*, 207 U. S. 73; 52 L. ed. 108; 28 Supr. Ct. Reporter 28, cited in the opinion of Mr. Chief Justice TAFT, the Court again followed the interpretation of the State Court showing that the statute in question was not to penalize a carrier for refusing to pay a claim within a reasonable time, but to bring about a prompt settlement of proper claims, a penalty operating as a deterrent of the carrier in refusing to settle just claims.

In the case of *Atchison, Topeka & Santa Fe R. R.* v. *Vosberg*, 238 U. S. 56; 59 L. ed. 1199; 35 Supr. Ct. Reporter 675, the Court held unconstitutional a statute of the State of Kansas providing for the payment of mutual demurrage charges and imposing upon an unsuccessful railroad litigant, in addition to such demurrage charges, a counsel fee, a charge from which the plaintiff shipper might be exempt. This was held to be an attempted ex-

ercise of the police power by the Legislature, and although the same result was arrived at as in the *Ellis* case, was held to be distinguishable from the circumstances in that case, because the instant statute was not a penalty imposed for the failure to pay a debt. There the Court held that, while attempting a classification by the supposed relation to the object of securing adequate car service, the statute really related to the object of securing adequate prosecution in court of actions respecting car service.

A careful examination of the subsequent citations of the *Ellis* case indicates that certain principles were enunciated by the Court which may here be considered.

Different conclusions arrived at by this Court upon what may appear at first glance to be similar statutes, are based primarily upon the interpretation of the purpose and effect by the respective State Supreme Courts of the acts under consideration. This Court has stated that it will follow the interpretation of the State Courts respecting the scope and purpose of the statute.

Upon that premise, let us therefore inquire into the expression of opinion by the Appellate Division of the Supreme Court, First Department, in the State of New York, in the case of *People* v. *Martin*, 203 App. Div. 423. At page 426, Mr. Justice DOWLING, in writing the opinion of the Court, said:

> "Reasons will at once suggest themselves why it is desirable that the public shall be protected to the extent of being able to recover some amount of damages from the owners of such vehicles (i. e., the vehicles referred to in the statute) * * *. And the

> claim urged by appellant that taxicab owners are unable to pay the charges for premiums on bonds shows that they must be to a large extent unable to respond to any judgments against them for damages caused by their negligence."

Here we have an interpretation by the State Court of the statute in question, by which the learned Court holds quite clearly that the purpose and effect of the statute is to insure to plaintiffs the payment of their judgment debts against those defendants within the scope of the act.

If this Court, in distinguishing the various decisions respecting statutes similar to that under observation in the *Ellis* case, has laid down the rule that, in so far as such statutes are for the purpose of compelling payment of debts by selected debtors, they are unconstitutional. Then, following the interpretation of the State Court that the purpose of the act in question is to insure the payment of damage to a plaintiff—purely and simply a statute requiring the payment of a debt—as such, under the decisions above referred to, the act now under review is unconstitutional.

POINT III.

The statute in respect to the bond required to be furnished by operators of the motor vehicles in question is unreasonable and unconstitutional.

In support of this contention, we respectfully refer to the language of Chief Justice BROWN, in the case of *State ex rel. Stephenson* v. *Dillon*, 69

Southern Reporter 558 and 560 (Fla.). There the Court referred to the provision of the statute then under review, for the filing of a bond providing for "continuing liability":

> "Just what is intended by this language 'continuing liability,' is not very clear. If it means that while the obligors are nominally bound for $5,000, yet after recovery of that amount it shall continue without limit to the number of occasions when liability may accrue, it is not only a nullification of the provision requiring that such bond shall be in the sum of $5,000 but it is unreasonable as it requires a person to provide sureties who will assume an indefinite and unlimited responsibility although nominally bound for only $5,000.
>
> We have no hesitation in saying that we regard this provision as an unreasonable requirement and therefore void."

Similarly, in the case of *Jitney Bus Co. of Wilkes-Barre* v. *The City of Wilkes-Barre*, 256 Pa. 462, Mr. Justice POTTER said:

> "The act requires owners of a jitney to furnish and keep in full force and effect either a bond or policy of insurance in a responsible company, authorized to do business under the laws of the State of Pennsylvania, in the sum of $2,500, conditioned to pay all losses or damage that may result to any person from the negligent operation or defective construction of said jitney automobile. Said bond shall be a continuing liability, notwithstanding any recovery thereon. If at any time the bond is found insufficient for any cause the city counsel may require the party to replace it with another bond.
>
> We are not quite clear as to what is meant

> by the requirement 'the bond shall be a continuing liability notwithstanding any recovery thereon.' If this provision means that while the bond purports to be in the penal sum of $2,500, yet after recovery to that amount the obligors shall continue to be liable for other and additional amounts without limit, then the requirement is clearly unreasonable. No surety could properly be required to take such an indefinite and unlimited responsibility."

The recent decision of the Supreme Court of the State of Illinois in *People* v. *Hastings,* 307 Ill. 92, likewise voided a statute of a similar nature requiring a ten thousand dollar bond with continuing liability. The Court said:

> "It must be conceded that the continuing liability clause in this case renders it practically impossible for any taxicab owner to induce private persons to become voluntary sureties upon such a bond."

The statute, being penal in its nature, will not be upheld if its meaning is doubtful and uncertain, so that it be difficult or impossible to comply with (*People* v. *Briggs,* 193 N. Y. 457).

The judgment should be reversed.

New York City, N. Y., November 12, 1923.

Louis Tyroler

LEFFERT & TYROLER,
KATZ & ROSEN,
Attorneys for Allied Taxi
Owners Association
(*Amicus Curiae*).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 126

WILLIAM HENRY PACKARD,
Appellant.

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

Brief of Attorney General of New York

CARL SHERMAN,
Attorney General of New York,
In Propria Persona,
Capitol, Albany, N. Y.

EDWARD G. GRIFFIN,
CLAUDE T. DAWES,
Deputies Attorney General,
Of Counsel

ALBANY
J. B. LYON COMPANY, PRINTERS
1923

SUBJECT INDEX

LIST OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM 1922

NO. 607

WILLIAM HENRY PACKARD,
Appellant,
against
JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

Attorney-General's Brief

STATEMENT

This is an application for an injunction during the pendency of an action brought to restrain the enforcement of a State law by the Attorney General and by the District Attorney of New York County. The District Court, Hough, Manton, CJJ. and Augustus N. Hand, DJ. denied a preliminary injunction, without opinion and without hearing the defendants, and the appeal was taken directly here pursuant to Sec. 266 of the Judicial Code.

The undersigned succeeded the defendant, Hon. Charles D. Newton, as Attorney-General of New York, upon January first of this year and

we make the same suggestion for substitution in his place and the same declaration of an intention to enforce the statute as was made upon behalf of the State Comptroller in *Gorham Manufacturing Co.* v. *Wendell*, 261 U. S. 1. Upon the point of local practice discussed there, see *Matter of Tiffany and Co.*, 80 Hun 486, which was not cited in our brief: *People ex rel. Lardner* v. *Carson*, 78 Hun 544.

After the decision of the United States District Court an injunction was sought by one Darnella against the Commissioner of Police of the City of New York and others, for the purpose of restraining the execution of the statute, and this was denied by the Mr. Justice Finch of the Supreme Court. There has been no appeal. *Darnella* v. *Enright et al.* 195 N. Y. Supp. 217. After a fair trial one Martin was convicted of violating the statute in driving a taxicab without a bond or insurance policy. The Supreme Court, Appellate Division, unanimously upheld the conviction, with opinion by Dowling J. This was affirmed without opinion by the Court of Appeals. *People* v. *Martin*, 203 App. Div. 423; 235 N. Y. 550. In the memorandum of Judge Finch, and in the opinion of Judge Dowling, reference was made to the traffic situation which we claim justifies this exercise of the police power. The very same questions were argued and decided favorably to us, as are presented here.

Jurisdiction was laid in the complaint in the case at bar only under the first subdivision of Sec. 24 of the Judicial Code and there is no attempt to rely upon the 14th subdivision. The application is brought on under Sec. 266 of the

Judicial Code. It seems, therefore, that the attack must be upon the statute as it reads and without reference to inequality in enforcement or harshness of administrative practice. *Yick Wo* v. *Hopkins*, 118 U. S. 356. Nor is there any allegation of diversity of citizenship under which claim of general unlawfulness can be taken, or perhaps of unconstitutionality by virtue of the constitution of the State. We do not suggest the possibility that these features may have intervened but we seek only to define the issue as requiring a determination whether or not this statute is unfair upon its face.

Upon the return day of the order to show cause the defendant, Attorney-General, answered admitting his intention to enforce the statute and denying the plaintiff's allegations of mixed law and fact attacking the statute. Affidavits in addition countering the claims of those offered in support of the complaint were handed up. Much we thus offered may be available within the rules of judicial notice, but our purpose in offering the affidavits was, so far as we could, to make part of the record the reasons for the policy of the law and to avoid any question upon appeal as to the existence of these facts. We did not intend, however, to circumscribe the investigation of the Court and we do not regard ourselves barred and limited by such facts justifying the law as may be submitted by affidavit. Certainly conditions in cities of the first class were not technically in evidence before the Legislature. The Court is free to inquire and we have the same liberty to argue for the policy upholding this statute as had the individual legislators who

enacted the law and the Governor who approved it. *Adkins* v. *Children's Hospital,* 261 U. S. 525. The plaintiff may have a burden to substantiate his allegations, but we have no shifting responsibility in this regard — not even in rebuttal. The rules of presumption operate wholly in favor of the law.

HISTORY OF THE STATUTE

The statute is no unconsidered legislative act passed in a moment of excitement. It is modelled upon the legislation of some fourteen other states and was discussed and examined at length by the Legislature and Governor. The bill was introduced by Assemblyman Kaufman on January 24, 1922, and by Senator Tolbert on February 23d. It was first passed as a Senate bill on March 15, after being reported on March 3d, and amended on March 9th. It passed in the Assembly on March 17th and was transmitted to Governor Nathan L. Miller. He had the bill under consideration until April 13th, when he approved it as Chapter 612, adding new section 282-b to the Highway Law, effective July 1, 1922. In the meantime, on March 27, the Governor held a public hearing at the Executive Chamber and heard arguments for and against the bill. Other hearings had been given before the legislative committees.

Prior to the enactment of the statute there is a long history of agitation for the bonding of operators, supported by the former head of the Motor Vehicle Bureau, Secretary of State Hugo; a presentment of the Grand Jury of New York County on October 28, 1920; recommendations of Chief

Magistrate McAdoo, an accumulation of alarming statistics indicating laxness in the operation of public vehicles, coupled with thousands of executions against taxi operators returned unsatisfied; various bills in the Legislature for past years providing a similar regulation. (Affidavits Record, pages 22-29, and Addendum to this Brief).

POINT I

A. REQUIREMENTS OF SUCH SECURITY FROM BUSINESSES AFFECTED WITH A PUBLIC INTEREST ARE AS COMMON AS SECURITY TO KEEP THE PEACE AND HISTORICALLY THE USE OF HIGHWAYS FOR PRIVATE TRAFFIC HAS ALWAYS BEEN SUBJECT TO SPECIAL REGULATION.

B. SUBSTANTIALLY SIMILAR LEGISLATION HAS BEEN UPHELD AGAINST SIMILAR ATTACKS IN THE INFERIOR FEDERAL COURTS AND IN THE COURTS OF LAST RESORT OF SOME EIGHTEEN STATES.

The segregation of cities of the first class for purposes of regulation is common in our law, and the particular regulation is but the extension of a familiar requirement for other occupations. Bonds have been required of those selling liquor, for the benefit of any one injured. These have been upheld, *Black on Intoxicating Liquors*, Sec. 149. The State has stepped in to compel obedience to judicial mandates in instances too numerous almost to compile. Pawnbrokers must

be licensed to secure the public against the pawnbroker's participation in crimes and pawnbrokers must also be bonded to prevent fraud upon their customers who might be " aggrieved by their misconduct " (Secs. 40-42, General Business Law). Private detectives must be licensed, and must also be bonded to secure any person injured " by the wilful, malicious and wrongful act " of the detective (Secs. 70, 73, General Business Law; *Fox* v. *Smith*, 123 A. D. 369). Auctioneers have been licensed and bonded from the earliest times (Sec. 23, General Business Law). Insurance agents must be licensed (Sec. 91, Insurance Law; *Stern* v. *Metropolitan Life Ins. Co.*, 169 A. D. 217). So also must junk dealers (Sec. 60, General Business Law; *City of New York* v. *Vandewater*, 113 A. D. 456), and peddlers (Sec. 30, General Business Law). Commission merchants must be licensed and bonded " to secure the honest accounting to the consignor of the moneys received or due and owing by such Commission Merchant " (Agricultural Law, Sec. 284). Steamship ticket agents must be bonded to insure against " fraud or misrepresentation to any purchaser of such ticket " (Secs. 150-154, General Business Law). Employment agencies must be licensed and bonded (Sec. 177, General Business Law) to pay the damages " occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit " on the part of the agency (*People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223; *Brazee* v. *Michigan*, 241 U. S. 340).

Therefore, at the outset of our argument we reinforce the ordinary presumptions by a demonstration of care and consideration in formulation

and resort to familiar principles in application.

The occupations of innkeepers, common carriers and a few others were at common law subject to special liabilities that could not justifiably be imposed upon ordinary activities. Elaboration or extension of restrictions to classes heretofore so segregated have not been examined under the same principles as cases where the law first imposes upon a long established industry or occupation special treatment. *Charles Wolfe Packing Co.* v. *Court of Industrial Relations of Kansas decided June 11, 1923.* The case at bar is not to be considered as in *Munn* v. *Illinois*, 94 U. S. 113, where for the first time grain elevators were declared to be vested with a public interest; or where persons selling real estate were subjected to stringent regulation, *Fisher Co.* v. *Woods*, 187 N. Y. 90; or where all dealers in milk were required to be bonded, *People* v. *Beakes Dairy Co.*, 222 N. Y. 416. Chief Judge Cullen, of our Court of Appeals, deals with the two classes of cases in an arresting dictum in *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53, 59, where he says:

> "It must be always remembered that law, even constitutional law, rests not wholly on principle, but in part on custom and tradition. A tourist from another planet might at first be unable to perceive why a citizen has the inalienable right to raise and possess chickens at all times, and yet can be deprived of that right as to partridges. But if he pursued his historical study of game laws back to the times when a common man ran greater danger of capital punishment for killing a deer than for killing a human being, he

would understand how the distinction came to exist. Chief Judge Ruger in the Schwab case shows that during and even since colonial times the calling of auctioneer had been regarded as a vocation not open to all, but subject to special license and authority."

Not only are automobiles carrying passengers for hire liable to special and peculiar regulation, but the whole subject matter of motor vehicles is classified separately, even where privately operated upon one's own personal business. So, when this Court came first to deal with the question of State laws coupled with licenses and regulations, a marked difference was recognized in relation to such vehicles. Their operation was classified as something not enjoying the same rights and privileges historically as ordinary businesses theretofore unregulated. In *Hendrick* v. *Maryland*, 235 U. S. 610, a unanimous court said that the movement of motor vehicles is attended by *constant and serious dangers* and is *abnormally* destructive of highways. Therefore, regulations to prevent such dangers could be enforced. Further it was said improved highways are a special facility for automobiles and justify not only the exaction of compensation but the imposition of the regulations. Whether the highways are city asphalt pavements or State improved concrete roads, the obligation of the user is ultimately to the State rather than to the municipality in New York State. *People ex rel. etc.* v. *Flagg*, 46 N. Y. 401.

State regulation of this subject was again tested in *Kane* v. *New Jersey*, 242 U. S. 160. The statute complained of there, in one feature was

like that in the case at bar. The New Jersey Law required non-resident owners to designate the Secretary of State as their attorney upon whom process might be served in any action growing out of the operation of an automobile. The regulation was upheld not only to those *moving into* the State, but also those *moving through* it. Therefore, the very complete control of the states over this particular subject has had the favorable scrutiny of this Court.

In its particular application this control has been said to extend to the power to absolutely exclude motor vehicles from the use of public highways. In upholding the constitutionality of the requirement that one after an accident must invite arrest by confessing even a misdeed, Chief Judge Cullen said in *People* v. *Rosenheimer*, 209 N. Y. 115, 35 Ann. Cases, 160; 46 L. R. A. (N. S.) 977:

> "* * * There is one ground upon which, in my opinion, the validity of the statute can be safely placed. *The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state.* It has been so held in *State* v. *Mayo*, 106 Me. 62, 20 Ann. Cas. 512, 75 Atl. 295, 26 L. R. A. (N. S.) 502, and *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513. Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person

must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle on account of its size and weight, of its great power and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. *The fatalities caused by them are so numerous as to permit the legislature, if it deemed it wise, to wholly forbid their use.* (*Otis* v. *Parker*, 187 U. S. 606, 23 S. Ct. 168, 47 U. S. (L. ed.) 323; *People* v. *Persce*, 204 N. Y. 397, 97 N. E. 877.) If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure any one in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway or even that in its operation injury to persons or property shall be a crime, *but only that failure by the operator, in case of such injury, to identify himself shall be criminal.* I cannot see why the greater power does not

> include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised. This principle was recognized by us in the case of *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, Ann. Cas. 1912B 156, 94 N. E. 431, 34 L. R. A. (N. S.) 162. * * * "

If such extreme restrictions applied to all automobiles would comply with the Constitution, does our statute become invalid as soon as it is limited to automobiles carrying passengers for hire?

The argument that such a limitation is unconstitutional is not new, but has been made unsuccessfully in many cases hereafter discussed or cited.

Where an even narrower application of the statute, required a bond or liability insurance for jitneys only, inequality and unconstitutional discrimination has been denied.

Huston v. *City of Des Moines*, 176 Iowa 455; 156 N. W. 883; *City of Memphis* v. *State of Tennessee*, 133 Tenn. 83; 179 S. W. 631; L. R. A. 1916 B. p. 1151; *Ex Parte Cardinal*, 170 Cal. 519; 150 Pa. 348; L. R. A. 1915 F. p. 850; *Dickey* v. *Davis*, 76 W. Va. 576; 85 S. E. 781; L. R. A. 1915 F. p. 840 are illustrative of cases where the court has sought for reasons to support a classification of "jitneys," although street cars and taxicabs were excluded from the requirement of a bond. The reasons given are interesting, but

are of chief importance here as demonstrating that even a more restricted classification may be upheld than we argue for. In the present statute we have a requirement that all motor vehicles "carrying passengers for hire" must be bonded or insured. Street cars and omnibuses are excluded, since both are under the supervision of the Public Service Commission and differ from taxicabs, etc., in essentials.

However, there are cases where the classification has been as broad as in our statute. *Nolen* v. *Riechman*, 225 Fed. 812, was decided by a statutory court of three judges in the Western District of Tennessee. The Court gives the reasons why automobiles operated as common carriers or for hire may be subjected to this special regulation without a like requirement for automobiles privately operated. (P. 819.)

> "It may well have been that the Legislature had in mind, when it enacted the statute in question, that those engaging in the business which the act sought to regulate operated vehicles susceptible of becoming dangerous to the public by the manner of their operation; that they had no fixed track upon which to run, and were at liberty to move over the entire surface of the street; that they had no schedule; that pedestrians had no way of knowing when and where to expect them; that they increased the danger to persons using the street, whether as pedestrians or while boarding or leaving street cars or other vehicles; that they stopped at street crossings, or along the curb between street

crossings to receive and discharge passengers; that very often the driver owns the machine, or at least an equity in it; that many of them are financially irresponsible; that the patrons of such vehicles are composed of men, women and children; that the vehicles in the hands of careless drivers, might rush through crowded streets at a dangerous rate of speed, probably without any financial responsibility to their patrons or others upon whom damage might be inflicted by such machines, because of the negligence of the operators."

The Court then goes on to say that the regulation might constitutionally be confined only to jitneys and not extended to taxicabs; but the opinion is careful to point out at page 820 that it is treating the statute and upholding it as if its restrictions applied to both jitneys and taxicabs.

Therefore, it appears that whether the classification includes or excludes taxicabs, it is neither too broad nor too narrow. This is right upon principle, for the power to make a grand classification is peculiarly legislative. "Legislation to be practical and efficient must regard the special purpose as well as the ultimate purpose." *St. John* v. *New York*, 201 N. Y. 633; as when advertising wagons and busses were excluded from *certain* city streets, *Fifth Ave. Coach Co.* v. *New York*, 221 U. S. 467.

Moreover a statute cannot be proved unconstitutional by thinking up other instances to which it might with equal propriety have been made to apply. (*S. W. Oil Co.* v. *Texas*, 217 U.

S. 114, 121; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.)

As is said in *Miller* v. *Wilson*, 236 U. S. 373, 383:

> "It is a well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsome* v. *Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carrol* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

And in *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227:

> "The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presented to be deemed by the legislature coextensive with the practical need."

A State, as was said in *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160:

> " may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.
>
> * * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

In the cases we shall now discuss in the second subdivision of this point, the reason why motor busses running on fixed routes, express trucks carrying packages instead of human beings and privately operated automobiles in large cities could properly be excluded from the requirement for a bond are in nearly every instance discussed. Of course, the division of legislation by classes of cities is very common in New York. Article 12, Sec. 2 of the State Constitution recognizes this. This we believe will not be much questioned. As was said in *Missouri* v. *Lewis*, 101 U. S. 22, 31:

> " If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its

> doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to."

See also *Mallett* v. *North Carolina*, 181 U. S. 589, 598; *Brown* v. *New Jersey*, 175 U. S. 192; *Maxwell* v. *Dow*, 176 U. S. 581; *Chappell Co.* v. *Sulphur Co.*, 172 U. S. 474, 475; *Gardner* v. *Michigan*, 199 U. S. 325, 333. See particularly *Fifth Ave. Coach Co.* v. *City of New York*, 221 U. S. 467, *supra*, where the regulation of vehicles was even limited to *certain* streets in the city.

Ever since the enactment of the Motor Vehicle Law of New York in 1910, there has been made distinction between the licensing of different vehicles. This classification has been constantly growing until differentiation has been made between commercial vehicles, trucks, trailers, omnibuses, station wagons, pleasure cars and light delivery wagons. (Highway Law, Article 11.)

In the very beginning, ordinance power, except in a single instance, was withheld from villages and granted in an increasing measure to cities (Sec. 288, Highway Law). Under the new General Highway Traffic Law, a motorist operating in a large city is subject to numerous and minute regulations from which he is free by mandate of the statute in smaller communities. All operators are required to be licensed in the Greater City; upstate only chauffeurs have to be personally licensed. Highway Law, Sec. 289.

B. The question of the right to require an indemnity bond in principle like that required under the statute in litigation here, has been considered in many cases and we have been unable to find any case where the provision was found unconstitutional. The United States Circuit Court of Appeals, Fifth Circuit, has passed favorably upon the question.

The cases are:

Federal.

Lutz v. *City of New Orleans*, 235 Fed. 978, aff'd. by 5th Circuit, Court of Appeals on opinion below, 237 Fed. 1018.

This was an application before District Judge Foster for a preliminary injunction. The plaintiffs complained of the requirement of a bond for $5,000. The ordinance required that a surety company bond only be given and no surety would execute such a bond without a deposit of $5,000 in cash. The law was held constitutional.

Nolen v. *Richman*, 225 Fed. 812, *supra*.

Shoenfield v. *City of Seattle*, 265 Fed. 727, Western District of Washington. Three judges pursuant to Sec. 266 of the Judicial Code.

Lane v. *Whitaker*, 275 Fed. 476. District Court of Connecticut, Manton, C. J., Thomas and Knox, D. J. J.

These cases recognize the rule of absolute regulation applied to as narrow a class as jitneys.

Massachusetts.

Commonwealth v. *Slocum*, 230 Mass. 180; 119 N. E. 687.
Commonwealth v. *Theberge*, 231 Mass. 386; 121 N. E. 30.

The ordinances pursuant to the statute required a surety bond for $1,000 upon all motor vehicles transporting passengers for hire between fixed and regular termini (jitneys). This was upheld in the first case as reasonable and the second case follows the ruling.

New Jersey.

West v. *City of Asbury Park*, 89 N. J. L. 402; 99 A. 190.
Gilland v. *Manufacturers Casualty Ins. Co.*, 92 N. J. L. 141; 104 A. 707.

The first case had to do with an act requiring an insurance policy of $5,000 from auto bus and jitney operators. Protest was made because taxicabs were not included, but the statute was upheld. The second case follows the West case.

Michigan.

Melconian v. *City of Grand Rapids*, 218 Mich. 397; 188 N. W. 521.
Substantially the same requirement was upheld here.

Wisconsin.

Ehlers v. *Gold*, 169 Wis. 494; 173 N. W. 325.

The statute here applied to all common carrier automobiles on fixed routes and required a bond to pay $2,500 to any one person, or $5,000 in any one accident. The constitutionality of the statute was not attacked. The verdict in favor of the plaintiff was set aside upon other grounds.

Illinois.

People v. *Kastings*, 307 Ill. 92; 138 N. E. 269.

This case followed the New York case of *People* v. *Martin, supra.*

Florida.

State ex rel. Stepherson v. *Dillon*, 82 Fla. 276; 89 So. 558.

The requirements of the ordinance here were as broad as in the statute in the case at bar. A bond or insurance policy of $5,000 was required of all motor vehicles carrying passengers for hire. The ordinance was upheld, but was condemned in so far as the liability on the bond was continuing.

West Virginia.

Dickey v. *Davis*, 76 W. Va. 576; S. E. 781; L. R. A. 1915 F. p. 840 *supra.*

The ordinance here required a bond of $5,000 of jitney operators and was upheld.

California.

Ex Parte Paul Cardinal, 170 Cal. 519; 150 Pac. 348; L. R. A. 1915 F. p. 850, *supra.*

An insurance policy for a maximum liability of $10,000 was required under the ordinance and was upheld.

Tennessee.

City of Memphis v. *State ex rel. Ryals*, 133 Tenn. 83, 179 S. W. 631; L. R. A. 1916 B. p. 1151, *supra*.

This law required a bond of $5,000 for each car operated as a jitney. The Court indicates the difference between the regulation which may be applied to automobiles and farm produce merchants. The statute was upheld.

Iowa.

Huston v. *City of Des Moines*, 176 Iowa 455; 156 N. W. 883.

This law required a bond of $2,000 for jitneys. A discrimination between jitneys on the one hand, and motor busses and taxicabs was held justified.

Pennsylvania.

Jitney Bus Ass'n. v. *City Wilkes-Barre*, 256 Pa. St. 462; 100 A. 954.

This law required a bond of $2,500 of jitneys and there was the same complaint that surety companies would not write the bond required. The Court criticized the lack of an alternative for personal sureties. The statute in the case at bar, of course, permits this alternative.

Georgia.

Hazleton v. *City of Atlanta*, 144 Ga. 775.

A bond of $5,000 for jitneys was required. Taxicabs were not included and the law was upheld. A distinction in favor of taxicabs was upheld.

Louisiana.

La Blanc v. *City of New Orleans,* 138 La. 243 So. 212; on rehearing 139 La. 113.

A law requiring a bond of $5,000 from jitney operators was upheld.

Nevada.

Ex Parte Counts, 39 Nev. 61; 153 Pac. 93.

A bond or insurance of $10,000 for jitneys was upheld.

Arkansas.

Willis v. *City of Ft. Smith,* 121 Ark. 606; 182 S. W. 275.

A bond of $2,500 was required of jitneys and was upheld.

Washington.

Hadfield v. *Lundin,* 98 Wash. 657; 168 Pac. 516, Ann. Cas. 1918 C. p. 942.

This case arose after the Supreme Court had twice held the law constitutional in:

State v. *Seattle Taxicab Co.*, 90 Wash. 416; 156 Pac. 837.
State v. *Ferry Line Auto Bus Co.*, 93 Wash. 614; 161 Pac. 467.

These cases are specially important because of the repeated examination of the question and because the law applied to all transportation for hire in cities of the first class. The law was upheld.

Texas.

Again, we have a jurisdiction where the question was repeatedly examined.

Ex Parte Parr, 826 Texas Crim. App. 525; 200 S. W. 404.
City of Dallas v. *Gill*, 199 S. W. 1144.

Various bonding and regulation provisions were upheld.

Rhode Island.

Providence v. *Lawrence*, 116 At. 664.

Substantially the same requirement was upheld.

Our law is the broadest in its classification of any we find has been enacted. The only carriers which use the streets which are excluded, are

street cars, express trucks and omnibuses operating upon a regular route. The reasons why street railway companies are not required to give a bond are fully set forth in the cases cited *supra*. These reasons apply equally to omnibuses operating under franchises; especially is this true in view of the provisions of Sec. 26 of the Transportation Act of New York, as amended by Laws of 1919, chapter 37, giving local authorities and the Public Service Commission a control and supervision over those not exercised over other types of motor vehicles carrying passengers for hire.

The foregoing having dealt with the claim that there is a denial of the equal protection of the laws, there is left the assertion that there is a taking of property without compensation or, rather, a denial of due process.

II

THE CLAIMS OF COSTLINESS ARE MISTAKEN, OR EVEN IF TRUE, WOULD NOT IMPAIR THE VALIDITY OF THE STATUTE.

The argument we have developed in our foregoing Point I seems to be unassailable by the very weight of authority. The plaintiff must distinguish the instant case from the foregoing, and there is left nothing therefore for him to assert except what is pleaded in the fifth paragraph of his complaint. There, referring to the cost of the bond, his claim is, " This law is unconstitutional

because it requires a man to pay out $960 a year to comply with it!"

Fortunately, such a figure for the cost of compliance cannot be substantiated and is indeed refuted in detail by the affidavits we submitted. We say fortunately, because we are solicitous that the policy of our lawmakers should not have imposed hardship upon the operators or compelled an increase in the cost of the service to the public. Although we may be interested in the policy of the Legislature, it surely does not follow that the court may condemn that policy simply because it may expend itself uneconomically.

The statute offers three methods of compliance:

1. A personal bond.
2. A surety company bond.
3. A policy of insurance.

Even if the stock companies will exact a maximum rate of $960 for taxicabs from certain individuals, for a policy of insurance, this charge does not represent the typical instance, for it covers accidents as well happening outside cities of the first class. We tried ourselves to ascertain what would be the cost of compliance and were confused with figures running all the way from $60 a year for a surety bond or policy of insurance to the maximum stated by the plaintiff. Yet, whatever is the ultimate truth as to the cost of the methods of compliance, there remains always the personal bond, costing nothing, which was provided by the Legislature with a wholesome regard for the operator in small business.

It must be apparent that the men who own and

operate their own cars and who can demonstrate to their neighbors and friends that they are careful, experienced and honest, compose the group of persons which the Legislature must have had in mind and for whose benefit it inserted the provision that the owner of a motor vehicle might file a bond executed by two personal sureties.

On the other hand, the large corporation which operates its taxicabs of necessity by hired agents or chauffeurs who come and go, shifting from month to month, would have no opportunity other than in the exceptional case to ask any one to vouch for their honesty, skill or experience, and to thus become a personal surety upon their bond. Such corporation would therefore on its part naturally look to the insurance company for its insurance policy or bond, which would in turn look to the corporation should it be held liable under the bond executed for the latter.

Curiously enough, in the hearings before the Governor and in the Legislature, the complaints against the law when then proposed, did not come from the larger corporations which would thus resort to surety companies, but from the operators of limited field, like the appellant, for whom the Legislature has provided three means of compliance.

Nevertheless, the appellant complains of the cost of a surety bond or insurance policy when special provision has been made for his case by which he can also obtain his coverage personally through friends.

Three possible methods of compliance have been provided, as we have noted, *i. e.*, a surety company bond, an insurance policy, a personal bond.

All three methods apply to every one the law affects. Variations in the coverage that may be afforded in the market are almost infinite and are argued out at length in our affidavits. Liability insurance has become one of the most common resorts in ordinary business experience. The Legislature has simply compelled persons exercising the *special privilege of trafficking on public highways* to seek a protection upon which the ordinarily prudent man operating a motor vehicle anywhere customarily depends.

Yet the astonishing charge is made that such compulsion is confiscatory. Certainly a strange test of reasonableness is set up, when the expense of a usual practice in business experience is offered as the only criterion.

We think that we have said enough to show that the statute is fair and constitutional upon its face. It is the practical operation of the law which is, nevertheless, still insisted upon by the appellant. Without allegation of sufficient jurisdictional grounds and lacking a proper experience test he argued below as an abstract matter that, although the legislation may be unimpeachable on its face, conditions in the market, which the lawmakers did not foresee, convert the measure into an unconstitutional one.

In the Tenement House cases (*New York Health Dept.* v. *Trinity Church, etc.*, 145 N. Y. 32; *N. Y. Ten. House Dept.* v. *Moeschen*, 179 N. Y. 325; affirmed without opinion, 203 U. S. 583) the claim that the cost of the installation of toilets and water in a tenement house was greater than the property profitably could withstand, was argued and rejected. These cases

illustrate a type upon which appellant doubtless relies for his test of reasonableness. We think he will find no case of compelling authority which decides that the mere cost of an improvement, appliance, device, system or practice impairs a law commanding their installation, where, as here and in the Tenement House cases, the thing ordered done is customary and usual in ordinary business. *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60; *Noble Bank* v. *Haskell*, 291 U. S. 104; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 306, and *The Tenement House* are all cases upholding the statutes that were attacked upon the ground they were expensive to comply with.

We emphasize that taxicab operation is not like mine operation, the management of a bank, the conduct of a grain elevator or the business of a milk factory. *Kansas Industrial Court Case, supra.* Regulation of these has nearly always been sustained, but limitations upon such regulation may be conceived to exist. No limitation whatever applies to the regulation by the Legislature of the use of city streets. The absolute prohibition of the sale of intoxicants was held not to be forbidden by the restraints upon Congress within its territorial jurisdiction. (*In re Rahrer*, 140 U. S. 545) or by the restraints upon the States (*Foster* v. *Kansas*, 112 U. S. 201). Taxicab drivers, livery keepers and others soliciting business upon the streets are in the same position as licensed dealers in liquors were. Therefore the question of costliness does not properly enter into the definition of a power which may absolutely prohibit. Admitting, as the plaintiff must, that the Legislature can forbid the operation of taxicabs, how can he be granted

the remedy sought here, because, instead of absolute prohibition, regulation may become so burdensome as to work the same lawful and constitutional result.

The court cannot properly say that because compliance may be costly the Legislature could never have intended this result. The purpose of the Legislature to require a surety bond, a personal bond or an insurance policy is perfectly clear and admitted by all.

THE JUDGMENT SHOULD BE AFFIRMED WITH COSTS.

ALBANY, N. Y., *Nov.* 7, 1923.

CARL SHERMAN,
Attorney-General of New York.

EDWARD G. GRIFFIN,
CLAUDE T. DAWES,
Of Counsel.

ADDENDA

THE STATUTE

Chapter 612

AN ACT to amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class.

Became a law April 13, 1922, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty of the laws of nineteen hundred and nine, entitled "An act relating to highways, constituting chapter twenty-five of the consolidated laws," is hereby amended by inserting therein a new section, to be section two hundred and eighty-two-b, to read as follows:

§ 282-b. Indemnity bonds or insurance policies in cities of the first class. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal bond, with at least two sureties

approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another approved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and

unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, while such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§ 2. This act shall take effect July first, nineteen hundred and twenty-two.

STATE OF NEW YORK,
Office of the Secretary of State. } *ss.:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

JOHN J. LYONS,
Secretary of State.

Comparison of Some State Laws Relating to Indemnity Bonds on Motor Vehicles for Hire.

STATE	Kind of vehicle	Amount of bond or surety	Administrative officer	Penalty	Miscellaneous
Connecticut Public Acts 1920–21, p. 3367–68, ch. 341.	Jitney	Basis of $500 per passenger; $5,000–$10,000 for 16 passenger car or less; $20,000 maximum.	Commissioner of vehicles	Fine of $500, imprisonment for one year or both.	Property liability $1,000.
Idaho Statutes 1919, v. 1, p. 665.	Automobile, auto stage, motor truck, motor vehicle or any self-propelled vehicle carrying passengers or freight along a particular line.	$2,000 for 5 or less vehicles; $5,000 for more than 5 vehicles.	Public utilities commission.	As for a misdemeanor	
Illinois Statutes (Smith) 1921, p. 1729–1730.	Motor vehicle in city of 100,000 or more carrying passengers for hire.	$10,000 for each vehicle	Secretary of State	Fine of from $100 to $500 or imprisonment in county jail for 30 days to 1 year or both.	
Iowa Acts 1921, p. 104.	Jitney buses and all motor vehicles engaged in carrying passengers on plan similar to street cars.	$5,000 for car carrying 10 passengers; $10,000 for car carrying more than 10 passengers.	Clerk of district court	$50–$100 or 60 days in county jail.	
Louisiana Constitution and statutes (Wolff), 1920, v. 2, p. 1235.	Service car, i. e., motor vehicles carrying passengers or freight.	$2,000 and an additional $500 for every passenger over four.	Clerk of the police jury.	Fine of $100, 90 days imprisonment or both.	
Massachusetts Gen. Laws, 1921, v. 2, p. 1680–81.	Motor vehicle offering transportation similar to railway.	Fixed by local authorities.	Local licensing authority.	$100 fine, 2 months imprisonment or both.	

COMPARISON OF SOME STATE LAWS RELATING TO INDEMNITY BONDS ON MOTOR VEHICLES FOR HIRE—*Cl'd.*

STATE	Kind of vehicle	Amount of bond or surety	Administrative officer	Penalty	Miscellaneous
New Hampshire Laws 1919, p. 108, ch. 86.	Motor vehicle carrying passengers for hire along a regular route.	$500 for each car and $100 for each passenger carried in it.	Public service commission.	$100 fine.	
New Jersey Acts 1921, p. 638–39, ch. 204.	Jitney or motor vehicle run along a route carrying passengers.	$5,000 for each vehicle...	Chief fiscal officer of the city.	For misdemeanor.	
New York Laws 1922, ch. 612.	All motor vehicles carrying passengers for hire in 1st class cities.	$2,500 for each car	Tax Commission....	For misdemeanor.	
Oregon Gen. laws, 1921, Special, p. 37–38, ch. 10.	Motor vehicles used in transportation of property or passengers.	Fixed by public service commission.	Public service commission.	Maximum fine of $1,000, maximum jail sentence of 1 year or both.	
Rhode Island Laws 1915, 1916, p. 244–47, ch. 1263.	Motor bus running on certain route.	Maximum of $500 per passenger.	Local licensing authority.	$50 fine for each offense.	Permissive.
Tennessee Code 1917, p. 1194–95.	Motor vehicle carrying passengers on plan similar to street railway.	Amount determined by locality but not less than $5,000 for each car.	Clerk of county court.	$50–$100 fine for each offense.	
Washington Laws 1920–1921, p. 341–42, ch. 111.	Motor vehicles operating along a fixed route carrying property or people.	Maximum of $5,000 for compensation to one person, minimum of $10,000 for all persons; $1,000 for property damage.	Public service commission.	For gross misdemeanor.	
Wisconsin Statutes 1921, v. 2, p. 1494–95.	Motor vehicles operating along fixed routes similar to street railways.	Maximum compensation to one person $2,500, for any one accident $5,000.	Railroad commission.	$10–$100 fine for each offense, or 10–90 days in jail.	